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performance of the grantee function. Such a rate or charge must be directly related to the service provided by the grantee (for which the fee recovers some or all costs incurred) to the zone participants. Rates or charges may incorporate a reasonable return on investment. Rates or charges may not be tied to the level of benefits derived by zone participants. Other than the uniform rates and charges assessed by, or on behalf of, the grantee, zone participants shall not be required (either directly or indirectly) to utilize or pay for a particular provider's zone-related products or services.

(b) *Delayed compliance date.* The compliance date for the requirements of paragraph (a) of this section shall be February 28, 2014.

§ 400.43 Uniform treatment.

Pursuant to Section 14 of the FTZ Act (19 U.S.C. 81n), a grantee shall afford to all who may apply to make use of or participate in the zone uniform treatment under like conditions. Treatment of zone participants within a zone (including application of rates and charges) shall not vary depending on whether a zone participant has procured any zone-related product or service or engaged a particular supplier to provide any such product or service.

(a) *Agreements to be made in writing.* Any agreement or contract related to one or more grantee function(s) and involving a zone participant (e.g., agreements with property owners and agreements with zone operators) must be in writing.

(b) *Evaluation of proposals.* A grantee (or person undertaking a zone-related function(s) on behalf of a grantee, where applicable) shall apply uniform treatment in the evaluation of proposals from zone participants. Uniform treatment does not require acceptance of all proposals by zone participants, but the bases for a grantee's decision on a particular proposal must be consistent with the uniform treatment requirement.

(c) *Justification for differing treatment.* Given the requirement for uniform treatment under like conditions, for any instance of different treatment of different zone participants, a grantee (or person undertaking a zone-related

function(s) on behalf of a grantee, where applicable) must be able to provide upon request by the Executive Secretary a documented justification for any difference in treatment.

(d) *Avoidance of non-uniform treatment.* To avoid non-uniform treatment of zone participants, persons (as defined in § 400.2(1)) within key categories set out in paragraph (d)(2) of this section shall not undertake any of the key functions set out in paragraph (d)(1) of this section (except in specific circumstances where the Board has authorized a waiver pursuant to paragraph (f) of this section).

(1) Key functions are:

(i) Taking action on behalf of a grantee, or making recommendations to a grantee, regarding the disposition of proposals or requests by zone participants pertaining to FTZ authority or activity (including activation by CBP);

(ii) Approving, or being a party to, a zone participant's agreement with the grantee (or person acting on behalf of the grantee) pertaining to FTZ authority or activity (including activation by CBP); or

(iii) Overseeing zone participants' operations on behalf of a grantee.

(2) Key categories of persons are:

(i) A person that currently engages in, or which has during the preceding twelve months engaged in, offering/providing a zone-related product/service to or representing a zone participant in the grantee's zone;

(ii) Any person that stands to gain from a person's offer/provision of a zone-related product/service to or representation of a zone participant in the zone; or

(iii) Any person related, as defined in paragraph (e) of this section, to the person identified in paragraphs (d)(2)(i) and (ii) of this section.

(e) *Definition of related persons.* For purposes of this section, persons that are related include:

(1) Members of a family or members of a household. The term members of a family means spouses, parents, grandparents, children, grandchildren, siblings (including half-siblings and step-siblings), aunts, uncles, nieces, nephews, and first cousins, as well as the parents, children, and siblings of a

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spouse, and the spouse of a sibling, child or parent;

(2) Organizations that are wholly or majority-owned by members of the same family or members of the same household;

(3) An officer or director of an organization and that organization;

(4) Partners;

(5) Employers and their employees;

(6) An organization and any person directly or indirectly owning, controlling, or holding with power to vote, 20 percent or more of the outstanding voting stock or shares of that organization;

(7) Any person that controls any other person and that other person (the term control means the power, direct or indirect, whether or not exercised, through any means, to determine, direct, or decide important matters affecting an entity); or

(8) Any two or more persons who directly control, are controlled by, or are under common control with, any person (see definition of control in paragraph (e)(7) of this section).

(f) *Waivers.* The grantee or other person subject to paragraph (d) of this section may submit an application requesting that the Board issue a waiver exempting from the prohibition of that paragraph a person's undertaking a specific key function(s) listed in paragraph (d)(1) of this section. Using the format developed by the Executive Secretary, an application for a waiver shall explain in detail how the person falls within a key category(ies) set out in paragraph (d)(2) of this section, and the specific key function(s) listed in paragraph (d)(1) of this section that would be undertaken by the person. After receipt of an application requesting a waiver, the Executive Secretary may solicit additional information or clarification, as necessary, including from the person submitting the application and from the grantee. Based on the information presented in the application, the Executive Secretary shall make a recommendation to the Board. A waiver shall be authorized only by an affirmative vote by the Board. If the Board votes not to authorize a waiver or to discontinue a waiver, the applicant shall be notified in writing and allowed 30 days to present evidence in re-

sponse. In deciding whether to grant a waiver, the Board shall determine whether there is an unacceptable risk that the waiver would result in non-uniform treatment being afforded by the person undertaking a key function(s) listed in paragraph (d)(1) of this section. In its assessment, the Board shall consider the specific circumstances presented, including the nature and extent of the person's involvement in undertaking a key function(s) listed in paragraph (d)(1) of this section. In general, the more significant the requester's involvement or interest in the undertaking of a key function(s) listed in paragraph (d)(1) of this section or activity(ies) identified in paragraph (d)(2)(i) of this section, the greater the risk will be that non-uniform treatment will be afforded and, thus, the less likely it will be that a waiver will be granted. The Board may attach to individual waivers such conditions or limitations (including, for example, the length of time a waiver is to be effective) as it deems necessary.

(g) *Requests for determinations.* A grantee or other party may request a determination by the Executive Secretary regarding the consistency of an actual or potential arrangement with the requirements of this section.

(h) *Identification of person undertaking function(s) on behalf of grantee.* The Board, the Commerce Department's Assistant Secretary for Import Administration, or the Executive Secretary, may require a zone grantee to identify any person undertaking a zone-related function(s) on behalf of the grantee.

(i) *Delayed compliance date.* If, as of April 30, 2012, existing business arrangements do not comply with the requirements of paragraphs (a) and (d) of this section, such existing arrangements shall be terminated or brought into compliance no later than February 28, 2014.

EFFECTIVE DATE NOTE: At 77 FR 12139, Feb. 28, 2012, § 400.43 was added. Paragraph (f) contains information collection and record-keeping requirements and will not become effective until approval has been given by the Office of Management and Budget.